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Amended to Reflect Further Public Comment Received, December 1, 2017

MEMORANDUM

TO: Members of the Commission

FROM: Joseph DeLosa, Public Utilities Analyst JDS

SUBJECT: IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL. C. §§ 351-363 AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005; REOPENED SEPTEMBER 4, 2007; AUGUST 5, 2008; SEPTEMBER 22, 2009; AUGUST 17, 2010; SEPTEMBER 6, 2011; SEPTEMBER 18, 2012; FEBRUARY 2, 2017) - PSC REGULATION DOCKET NO. 56

Background

On December 30, 2016, Judge LeGrow issued a Memorandum Opinion[1] overturning Commission Order No. 8807 (December 3, 2015), requiring the Commission to revise their regulations to implement "procedures for freezing the [yearly increase in the Renewable Portfolio Standards ("RPS")] requirements."[2] The Opinion required that the Commission be vigilant not to "collapse… plain, and presumably intentional, statutory distinction[s]" where they may exist in the statute, and to give words their "plain and ordinary meaning."[3] The Commission issued the first set of responsive draft regulations in Order No. 9024 (February 2, 2017), and a second set of draft regulations in Order No. 9090 (July 25, 2017). At the December 7th meeting, the Commission's agenda will permit consideration of oral arguments from those parties that submitted comments,

[1] *DPA v. PSC*, C.A. N15A-12-002 AML. ("Opinion")
[2] *Id.* Slip op. at 11.
[3] *Id.*

and the Commission will be asked to determine whether to publish the draft regulations as final or develop new draft regulations.

Commission Staff ("Staff") previously submitted a substantive response in this matter replying to the initial comments of the parties. This document summarizes Staff's position with respect to the disputed issues in this docket.

1. Total Retail Cost of Electricity for Retail Electric Suppliers.

To determine whether "the total cost of complying with" the RPS requirement exceeds the threshold percentages indicated in Sections 354 (i)&(j), the statute instructs comparison against "the total retail cost of electricity for retail electricity suppliers" during a compliance year ("CY").[4] Retail electricity supplier[s]" are defined in Title 26 as "a person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."[5]

Retail costs are those paid by end-use customers.[6] The statute instructs that sales at "retail prices" are those between a retail electricity supplier (or a municipality, which is not at issue here) and an end-use customer.[7] Delmarva is a retail electric supplier, as are other power producing entities certified to serve load by the Commission. Delmarva, as an entity, is unquestionably a retail electric supplier in its role as a distribution utility.[8] As the Division of the Public Advocate ("DPA") shows, end-use customers can, under restructuring, pay retail prices for electricity to more than one retail electricity supplier simultaneously, for the same kilowatt-hours of electricity.[9]

In order to capture the "total retail costs," it is necessary to include the retail costs sold to end-use customers by all retail electricity suppliers. These are the costs "for" the suppliers.[10] Any amount less than that cannot be said to be the "total retail costs." Instead, commenters rely on the fact that Delmarva is not a retail electricity supplier when it provides distribution service. This

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[4] 26 *Del. C.* §§ 354(i), (j).
[5] 26 *Del. C.* § 352(22).
[6] 26 Del. C. § 352(7). ("'End-use customer' means a person or entity in Delaware that purchases electrical energy at retail prices from a retail electricity supplier or municipal electric company.")
[7] *Id.*
[8] 26 Del. C. § 352(22). ("…[A] person **or entity** that sells electrical energy to end-use customers in Delaware, including but not limited to nonregulated power producers, **electric utility distribution companies** supplying standard offer, default service, or any successor service to end-use customers.")(emphasis added).
[9] *See* DPA Reply Comments at Exhibit C.
[10] Responsive Staff Memo at 7-8. ("Staff's analysis bares two potential meanings [of the word 'for' in the statute]: 1) the total cost 'for' electricity services incurred by the retail electricity supplier to provide service; or 2) the total cost 'for' selling retail electricity to end-use customers. These interpretations distinguish the 'total costs for' **buying or providing** electricity versus the 'total costs for' **selling** electricity. The statute's use of 'retail' must be included in interpreting other language and, therefore, precludes the former meaning.) (emphasis in original).

argument fails since Delmarva, as the ***"entity"*** is the retail electricity supplier.[11] Accordingly, any retail sale from Delmarva to an end-use customer is a part of the "total retail costs." Any retail sale from any other retail electricity supplier similarly qualifies as "total retail costs."

2. <u>"Bloom."</u>

At issue is whether the costs of the monthly disbursements to Diamond State Generation Partners ("Bloom") should be included in the calculation of cost of compliance under Sections 354(i)&(j). Specifically, the relevant portion of Section 354(i) reads "the total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments;" Section 354(j) mirrors Section 354(i) as it pertains to all renewable energy.

Staff accorded these words their plain and ordinary meaning, and therefore limited the costs of compliance to those elements specifically mentioned in the statute. The statutory text illustrates how REC equivalencies are to be treated in Section 364(d), which states that Bloom "entitles the [CREC] to reduce its REC and SREC requirements as provided for in § 353(d) of this title…" Bloom is not qualified as an "eligible energy resource" in Section 352(6), and as a result, no RECs or SRECs are produced, even though such equivalencies may be used to "fulfil" a portion of Delmarva's REC or SREC requirement.[12]

While the relevant cost-cap language (Sections 354(i)&(j)) was added to Title 26 in 2010,[13] the Bloom amendments were not added until a year later.[14] The 2011 amendments were voluminous, amending or adding §§ 352(16), 352(17), 353(c), 353(d), 354(a), 354(d), 354(e), 354(f), and 364(b)-(i) of Title 26. These additions included protection of revenue property[15] for a full recovery of costs[16] for 20 years,[17] illustrating that the legislature must have known the expense to be borne by Delmarva ratepayers for the project. If the legislature chose not to change statutory language in light of other substantial changes, there is a strong likelihood than there was intention not to change the meaning.[18] The legislature easily could have added Bloom to Sections 354(i)&(j). They did not, and it is Staff's recommendation that the Commission not make that choice here.

However, if the Commission chooses to consider costs other than those listed in the statute, why should Bloom be the only additional line-item included? DNREC's rule-making has shown that significant benefits (negative costs) exist as a result of compliance with the RPS. If

[11] *Supra.* n. 8.
[12] *See* 26 *Del. C.* § 353(d).
[13] 77 Del. Laws, c. 451 (Jul. 20, 2010).
[14] 78 Del. Laws, c. 99 (Jul. 7, 2011).
[15] 26 *Del. C.* § 364(f).
[16] 26 *Del. C.* §§ 364 (a)-(c).
[17] 26 *Del. C.* § 364 (d)(1)b.
[18] Responsive Staff Memo at 16-18. (citing *Simmons v. Delaware State Hospital*, 660 A.2d 384, 389 (Del. 1995))

costs outside the statutorily enumerated categories are included, no rationale has been presented as to why Bloom costs specifically should be added, with no consideration or inclusion of other types of positive and negative costs.

3. E&C Director's Discretion.

Sections 354(i)&(j) state: "The State Energy Coordinator in consultation with the Commission, may freeze…" the RPS requirement. At issue is the exact meaning of this phrase, and how it should be implemented in the Commission's regulations under the guidance of the Opinion. Specifically, the question is how much, if any, discretion exists for the E&C Director to decide whether or not to implement a freeze.

In the July 25 draft regulations and associated Staff responsive memo, Staff noted the difficulty presented by the statutory language on this issue.[19] The July 25 proposed regulations gave discretion to the E&C Director, but only to the extent that the E&C Director would not be able to "silently" avert a Freeze.[20] Staff also thought it crucial to continue to give meaning to the distinction between "may" and "shall" in the statute in accordance with the Opinion.[21]

DNREC was concerned with Staff's proposed revisions, stating in their reply comments that the Commission is unable to infer a right of judicial review on DNREC,[22] that the proposed regulations were inconsistent with the Administrative Procedures Act, and that certain DNREC actions are in a "category of agency conduct that 'operate[s] outside the scope of the APA.'"[23] DNREC's contentions are persuasive. This does not change the requirement for final agency action under the APA illustrated by the legislative history.[24] Staff understands DNREC's contention that "the Commission's regulatory authority is limited to specific topics,"[25] but would note that this tenet should similarly apply to the E&C Director. The Commission's regulatory authority includes exclusive jurisdiction over monitoring and verifying RPS compliance;[26] the E&C Director's does not. Accordingly, the Commission would be required to issue an Order to the Commission-regulated electric company ("CREC") even if the sole power to declare a Freeze remained with the E&C Director.

Just as DNREC contends the Commission cannot saddle them with a requirement for judicial review, the Commission should not entertain the premise that it will issue an Order without any of its own deliberation. A Commission Order is, by definition, final agency action. If the final E&C Director's determination actually determines whether to institute a Freeze, without further Commission deliberation, the Commission could potentially find itself in the extremely

[19] Responsive Staff Memo at 33.
[20] *Id.* at 30, 32-33.
[21] *Id.* at 25, 32.
[22] DNREC Reply comments at 2, 5.
[23] *Id.* at 4. (citing *O'Neill v. Town of Middletown* (Del. Ch. Jan. 18, 2006))
[24] *See* Myers March 31, 2017 comments at 9. (citing SS 1 HD at 6-7 (O'Mara)) ("actual price control")
[25] DNREC Reply comments at 5.
[26] 26 *Del. C.* § 353(a).

untenable position of defending in Court an Order with which it does not agree, on an issue under its exclusive jurisdiction.

In heeding DNREC's advice that "the Commission's regulatory authority is limited to specific topics,"[27] Staff has recommended non-substantive changes to the proposed regulations to clarify the Commission's role. Since DNREC does not have jurisdiction over CRECs, and since a Commission Order would therefore be required to institute a Freeze, Staff recommends that the Commission assert its authority to review and consider the E&C Director's determination before it decides whether to Freeze the RPS.[28] A Freeze, in practice, is the Commission changing the level of RPS compliance required from the CREC. As a result, the proposed language is consistent with DNREC's request to limit the Commission's authority to matters within its jurisdiction. This change also does not rise to the level of a substantive change, since the July 25 regulations also include an E&C Director determination and resulting Order from the Commission. This change also provides a level of discretion, giving meaning to the distinction between "may" and "shall" in the statute,[29] as required by the Opinion.

One further non-substantive revision also protects the Commission from potentially having to defend an Order with which it does not agree in Court. In section 3.2.21.9.2 of the submitted draft regulations, the Commission would also consider and review DNREC's determination that "the total cost of compliance can reasonably be expected to be under the [...] threshold."[30] Due to the statute's instruction that the Freeze "shall be lifted" upon a finding of reasonableness, The proposed change allows the Commission to consider and decide whether to lift the Freeze as a result of this E&C Director determination, by deciding whether the determination is "reasonable" in accordance with the statute.

Conclusion

During the week of November 27, Staff received 24 additional out-of-time public comments. These comments mostly advocate for the inclusion of Bloom in the calculation of the cost of compliance. Staff compiled these public comments, and uploaded them to the DelaFile docket[31] on December 1, 2017.

Staff recommends that the proposed regulation should be published as final. A draft Order containing proposed regulations reflecting these non-substantive changes has been presented for the Commission's consideration.

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[27] *Supra.* n.25.
[28] This change is reflected in 3.2.21.6.2 in the draft regulations posted for the December 7th Commission meeting.
[29] *See supra.* n.21.
[30] 26 *Del. C.* §§ 354(i), (j).
[31] https://delafile.delaware.gov By entering "Reg. 56" in the "Docket #" search field.